KIRKLAND & ELLIS

Kirkland Alert

Supreme Court Issues Decision Overturning Affirmative Action in Higher Education

30 June 2023

On June 29, 2023, the Supreme Court of the United States issued its decision addressing two cases that challenged affirmative action in higher education, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina.* In a 6-3 decision, the Supreme Court held that race-based affirmative action in higher education violates the Equal Protection Clause of the Fourteenth Amendment and Title VI.

This *Alert* summarizes the key holdings of the Supreme Court's decision and its potential application to corporate employment practices.

I. Key Takeaways

- The Supreme Court, in a 6-3 decision, struck down affirmative action programs at Harvard University and the University of North Carolina as violating the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964.
- The impacts of the decision on university admission systems are sweeping and immediate: universities may not make use of race-based admission systems, which have been in place in many institutions for decades. Practically, however, many admissions systems have been preparing for this outcome for some time which may help mitigate disruptions from the ruling.
- Although the Court's decision applies to universities governed by Title VI and not private employers governed by Title VII, it is plausible that lower courts will begin to analogize the outcome of the case to private employment discrimination matters.

II. Background

A. Legal Framework Preceding the *SFFA* Cases

The two cases filed by the Students for Fair Admissions, Inc. ("SFFA") are the latest in a series of cases brought before the Supreme Court challenging the role of race-based admissions in higher education. The Court's rulings in these cases have evinced increasing skepticism toward affirmative action.

In *Regents of the University of California v. Bakke* (1978), a divided Supreme Court found that while racial quota programs violated the Equal Protection Clause, race could be used as one of a set of factors that universities use in admission decisions. Critically, Justice Powell wrote that campus diversity was a "compelling interest" that universities could pursue so long as they used the least restrictive means available.

The Court next addressed the twin cases of *Gratz v. Bollinger* and *Grutter v. Bollinger* in 2003. In *Gratz*, the Supreme Court held that the university policy of granting points to an applicant based on race was unconstitutional because the practice made race a decisive factor in admissions. In *Grutter*, on the other hand, the Court found that a law school had a compelling interest in student diversity and that its use of an individualized assessment that considered race holistically was a narrowly tailored, and therefore permissible, practice.

The Supreme Court further refined its holdings on affirmative action in the two *Fisher v. University of Texas* cases. In *Fisher I* in 2013, the Court held that cases challenging race-conscious admissions programs are subject to the standard of strict scrutiny. Courts assessing university admissions programs must apply strict scrutiny to determine whether the programs are "precisely tailored to serve a compelling governmental interest." In *Fisher II* (2016), the Court found that the University of Texas met that standard.

B. The *SFFA* Cases

Both cases by the SFFA were filed in 2014 and challenged the use of race as a factor in university admissions decisions. One lawsuit challenged Harvard University's ("Harvard") practices, asserting that the college discriminated against Asian Americans by considering race and ethnicity as part of a candidate's personal rating. The other challenged the University of North Carolina ("UNC"), alleging that the university discriminated against White and Asian American students by considering race as part of a holistic admissions program. In both its briefing and oral arguments, SFFA asserted that the use of race in university admissions programs violates Title VI

of the Civil Rights Act of 1964 and/or the Equal Protection Clause of the Fourteenth Amendment.

Title VI prohibits discrimination on the basis of race, color and national origin in any program assisted by federal funding. Almost all universities and colleges, including Harvard and UNC, receive federal funding in the form of student aid and research grants. The Equal Protection Clause prohibits race-based discrimination by state and federal governments except when: (1) furthering a compelling government interest, and (2) using the least restrictive means available. Because UNC is a state university, it is also subject to the Equal Protection Clause.

Both SFFA cases asked the Court to overrule its previous decision in *Grutter* and to find that universities and colleges are not allowed to use race as a factor in admissions decisions.

1. Ruling

In a 6-3 decision, the Court held that Harvard's and UNC's use of affirmative action in their admissions policies violates the Equal Protection Clause of the Fourteenth Amendment and Title VI. The Court began by surveying its case law from the enactment of the Fourteenth Amendment onward, stating that its decisions have always reflected the "core purpose" of the Equal Protection Clause: to eliminate "all governmentally imposed discrimination based on race." Any exception, the Court explained, must satisfy "strict scrutiny," a demanding level of review that permits discrimination on the basis of race only if it: (1) serves a compelling government interest, and (2) is narrowly tailored to achieve that interest.

The Court concluded that the universities have "fallen short" of satisfying that burden. The universities' interest in obtaining the educational benefits of a diverse student body were "commendable goals" but not "sufficiently coherent for purposes of strict scrutiny." The objectives outlined by both institutions — like training future public and private sector leaders, preparing graduates to adapt to an increasingly pluralistic society, and enhancing cross-racial understanding — lacked precision and measurability. The Court stated that it was "unclear how courts are supposed to measure any of these goals." And the Court held that the universities' use of race was not narrowly tailored because the use of affirmative action did not necessarily further the goals the universities sought to achieve.

Next, the Court emphasized that race-based admissions systems violate the Equal

Protection Clause by using race "as a 'negative'" and by perpetuating racial stereotypes. The Court reasoned that by grounding their admissions policies in race-based considerations, the universities were failing to treat citizens as individuals and were, instead, classifying them as components of a racial class. Drawing from its opinion in *Grutter*, the Court also stressed that affirmative action only ever survived constitutional review because it was thought to be temporary and to have a "logical end point." According to the Court, however, the universities' admissions programs have no logical endpoint because it will never be clear when the universities' goals will have been achieved.

In sum, the Court concluded, the admissions programs violated the Equal Protection Clause because they "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful endpoints." The Court observed that universities can continue to consider how race has influenced an applicant's life experiences, specific to that applicant's "unique ability to contribute to the university." But "the student must be treated based on his or her experiences as an individual — not on the basis of race."

III. Expected Impacts

A. Immediate Application to Higher Education

The impact of the Court's ruling is immediate and sweeping: universities may not make use of race-based admissions systems. For many institutions, this represents a change from an admissions approach that has been in place for decades. That said, many educational institutions and admissions officers have been monitoring the SFFA cases and preparing for the effects of an opinion overturning an affirmative action approach to admissions for some time, which may help mitigate disruptions from the ruling. To the extent they have not already done so, universities which rely on a race-based admissions approach will need to retool their method of candidate selection. Schools should also anticipate increased scrutiny of their admissions programs by potential litigants and others for disallowed race-based admissions practices, including, as the majority opinion cautions, indirect efforts to reestablish the prior system ("universities may not simply establish through application essays or other means the regime we hold unlawful today").

B. Potential Application to Employer Initiatives

The Supreme Court's decision is applicable solely to race-conscious college admissions programs; public and private companies will not be directly impacted by this decision.

Nevertheless, even though the challenged affirmative action programs were governed by Title VI and the Fourteenth Amendment while employment-based decisions are governed by Title VII, it is possible that lower courts may later use this precedent to analogize affirmative action in the university admissions context to the employment context. Companies could face questions from their boards, shareholders and employees about possible downstream effects from these decisions.

1. Title VII vs. Title VI

Title VII protects employees and job applicants from discrimination based on race, color, religion, sex, national origin, disability or age, and it covers the full spectrum of employment decisions, including recruitment, selection, termination, promotion and any other decisions concerning the terms and conditions of employment. While the holdings in the SFFA cases do not directly address Title VII, courts have regularly borrowed from decisions construing Title VII in their consideration of Title VI cases and vice versa.[1]

2. Voluntary Affirmative Action Programs

Unlike in higher education prior to the SFFA cases, Title VII and other employment-related anti-discrimination statutes prohibit consideration of race in employment decisions, with very few exceptions. One exception is voluntary affirmative action programs that meet the requirements outlined by the Supreme Court in *United Steelworkers of America v. Weber*, 443 US 193 (1979) and its progeny. In *Weber*, the Supreme Court held that voluntary affirmative action programs were permissible under Title VII so long as they: (1) were remedial in nature and designed to eliminate a clear imbalance in traditionally segregated job categories; (2) do not unnecessarily hinder the interests of non-diverse candidates; and (3) are temporary measures intended to attain, but not maintain, a balanced workforce.

The U.S. Equal Employment Opportunity Commission ("EEOC") provided its own guidance in 1979 on voluntary affirmative action programs under Title VII. The guidance requires, among other things, that (1) an employer-conducted analysis show actual or potential adverse impact from current practices; (2) affirmative actions are needed to

correct the effects of past discriminatory practices; and (3) historic restrictions have limited the available labor pool, particularly for qualified diverse candidates.

These voluntary programs have been relatively rare, given that both *Weber* and the EEOC guidelines make clear that employers cannot implement race-conscious employment practices without sufficient justification that generally indicates a history of discrimination. More broadly, while the Supreme Court's holdings in the SFFA cases do not address these voluntary programs, commentators have suggested there may be future cases that transpose the Court's reasoning from the educational sector to the employment sector.

3. Affirmative Action Plans for Federal Contractors

In addition to voluntary affirmative action programs, certain federal contractors and subcontractors are subject to affirmative action requirements. These rules mandate that federal contractors conduct data-driven analyses of their workplaces and set goals related to recruitment, hiring and training practices. Such goals, including placement goals, utilization goals and hiring benchmarks, may not be interpreted as quotas or used as strict floors or ceilings in employment numbers, but instead, may only be measures of representation in the workforce.

At this time, it appears unlikely that such requirements will be affected by the Supreme Court's decisions. Affirmative action obligations for federal contractors are significantly different from those at issue in the SFFA cases. Federal contractors and subcontractors are expressly prohibited from considering race as a factor in an individual's hiring or any other employment-related decision. Moreover, federal contractors are not permitted to set quotas, preferences or set asides based on protected characteristics. Instead, covered contractors may only use collective data on protected characteristics as a tool, for example, to compare groups' actual employment against their availability, assess the effectiveness of recruitment and outreach efforts, and evaluate personnel processing and promotion standards.

Colleen Mayer and Hacibey Catalbasoglu provided helpful research and drafting assistance in support of this Alert.

1. *See, e.g., Darensburg v. Metropolitan Transp. Com'n*, 636 F.3d 511, 519 (9th Cir. 2011) (looking to Title VII jurisprudence to analyze Title VI claims); *see also N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (noting that the elements of a Title VI disparate impact claim are similar to the analysis of cases decided under Title VII). ↩

Related Professionals

Sofia Martos

Partner / Los Angeles – Century City

Ralph N. Dado III

Partner / Chicago

Christie Alcala

Partner / Houston

Alexandra N. Farmer, P.C.

Partner / Washington, D.C.

George W. Hicks, Jr., P.C.

Partner / Washington, D.C. / Dallas

Sydney Jones

Partner / Washington, D.C.

R.D. Kohut

Partner / New York

Jay P. Lefkowitz, P.C.

Partner / New York

Jennie Morawetz

Partner / Washington, D.C.

John C. O'Quinn, P.C.

Partner / Washington, D.C.

Carolyn J. Weltman

Associate / Chicago

Related Services

Practices

- ESG & Impact
- Litigation
- Appeals
- Government, Regulatory & Internal Investigations
- Employment & Labor

Suggested Reading

- 22 September 2023 Speaking Engagement American Bar Association's Environmental Transactions Masterclass
- 30 June 2023 In the News 2023 Rising Star: Kasdin Miller Mitchell
- 29 June 2023 Kirkland Alert ISSB Releases Final Global Sustainability Disclosure Standards